



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. APPLICATION NO. 74 OF 2010**

**IN THE MATTER OF APPLICATION FOR ORDERS OF PROHIBITION,  
CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF COMMISSIONER OF LANDS**

**AND**

**IN THE MATTER OF REGISTRATION OF TITLES ACT  
(CAP 281 LAWS OF KENYA)**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COMMISSIONER OF LANDS .....1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF TITLES ..... 2<sup>ND</sup> RESPONDENT**

**EX PARTE**

- 1. CHETAN DEVJI SHAH**
- 2. DIPTI CHETAN SHAH**

**JUDGMENT**

The Ex parte applicants, hereinafter referred to as “**the applicants**”, filed an application by way of a Notice of Motion seeking the following orders:-

- “1. AN ORDER OF CERTIORARI to quash the decision of the Registrar of Titles, Nairobi, contained in the Kenya Gazette Notice No. 3460 dated 1<sup>st</sup> April 2010 revoking (the title to) the land parcel LR No. 209/10345/20.**
- 2) AN ORDER OF PROHIBITION prohibiting the Registrar of Titles, Nairobi, from recalling, canceling and/or impeaching the Applicant’s title to L.R.No. 209/10345/20 and/or making any entry in the Register in respect of Land Parcel L.R. No.209/10345/20 and from acting in any way prejudicial to and/or inconsistent with the Applicants’ registered proprietorship of Land Parcel L.R.No. 209/10345/20.**
- 3) AN ORDER OF PROHIBITION prohibiting the Registrar of Titles, Nairobi, from disseminating, publishing, placing advertisements, notification to the public in any form of media, expressing, making representations and or verbal utterances to anyone in any way or manner or at all, of any matter or material which may be construed as being inconsistent with the legality of the**

**registered proprietorship of the Applicants over L.R.No. 209/10345/20.**

**4) Costs of this application be provided for.**

**5) Any other order or relief as the Honourable Court may deem fit and expedient to grant”**

The application was supported by an affidavit sworn by **Chetan Devji Shah**, the first applicant. The 2<sup>nd</sup> applicant is the 1<sup>st</sup> applicant’s wife. The applicants are the registered owners of a parcel of land known as **LR No. 209/10345/20**, hereinafter referred to as “**the suit property**”. The suit property is a leasehold interest from the Government of the Republic of Kenya for a period of 99 years with effect with 1<sup>st</sup> January, 1987. The suit property was sold to the applicants by Ramji Ratna & Co. Ltd. vide a transfer dated 3<sup>rd</sup> November, 1998 and registered on 24<sup>th</sup> February, 1999. The consideration thereof was Kshs.6 million.

The suit premises were sold together with the buildings erected thereon. The applicants obtained a loan from Fortune Finance Limited to enable them purchase the property. The applicants have been faithfully paying all the land rent and rates in respect of the property.

Sometime in April, 2010 or thereabout the Permanent Secretary, Ministry of lands, issued a Press statement directing the Registrar of titles, Nairobi, to place a caveat in the lands register in the respect of the suit property and several others. Following that press statement the 2<sup>nd</sup> respondent published in the Kenya Gazette Notice No. 3460 on 1<sup>st</sup> April, 2010 revoking the title to the suit property alongside several others. In the said Gazette Notice the 2<sup>nd</sup> respondent stated as hereunder:-

**“Whereas the parcels of land whose details are described under the schedule herein below were allocated and titles issued to private developers, it has come to the notice of the Government that the said parcels of land were reserved for public purposes under the relevant provisions of the Constitution, Government Lands Act (Cap 280) and Trust Land Act (Cap 288) The allocations were therefore illegal and unconstitutional.**

**Under the circumstances and in view of the public need and interest, the Government revokes all the said titles.**

**SCHEDULE**

**NAIROBI**

**L.R. NO. 209/13685**

.....  
.....  
.....  
.....

.....

**L.R. NO 209/10345/20**

.....  
.....

**G.G GACHIHI**

**Senior Registrar of Titles, Nairobi.”**

The applicants stated that the aforesaid actions contravened their constitutional rights to own property. They were not consulted before their title was revoked. The financial institution that had advanced money to enable them purchase the land is also concerned about this turn of events and has threatened to recall the entire loan to the applicants’ detriment.

For the aforesaid reasons, the applicants sought this court's intervention.

The respondents did not file any replying affidavit but filed written submissions in response to the applicants' submissions. The respondents' submissions may be summarized as hereunder:

- a) **Section 60 of the Registration of Titles Act empowers the Registrar of Titles to recall any title deemed to be defective for purposes of rectification.**
- b) **The suit land was irregularly transferred as it was initially public land.**
- c) **The applicant's rights are not absolute, they are subject to other people's rights and the general public interest at large.**
- d) **The application is bad in law and the orders sought cannot be granted. The court cannot decide the issue of ownership of a parcel of land in a judicial review application.**

It is unfortunate that the respondents did not deem it necessary to file replying affidavits in response to the issues raised by the applicants. The applicants raised very fundamental issues that ought to have been answered in a very specific manner. Submissions, whether oral or written, cannot take the place of a replying affidavit in a matter that is contested as this one.

In the absence of a replying affidavit how can the court know whether the suit land was irregularly acquired or not, how can the court tell whether the land had initially been reserved for the benefit of the public or not?

In an adversarial system of justice if a party fails to file a defence to a plaint or a replying affidavit in an application that is premised on an affidavit, the court is entitled to assume that the factual averments or depositions are not contested. Whereas the applicant still bears the burden of proof even if the application is not challenged, the respondent cannot adequately contest the applicant's factual depositions by way of submissions.

The copy of certificate of the title that was annexed to the applicant's affidavit shows that the title was issued by the second respondent to Ratna and Company Limited on 6<sup>th</sup> December, 1996. The said company developed the property. The developer must have obtained all the necessary consents from all the relevant authorities, including the Commissioner of Lands. The developed property was then sold to the applicants in 1999. Apart from the Kshs.6,000,000/= advanced to the applicants by fortune finance, there is also a charge to Fina Bank Limited for Kshs.16,000,000/- that is registered against the title.

The second respondent, without affording the applicants any opportunity to be heard, proceeded to revoke the title to the suit property. That was in breach of the rules of natural justice.

That decision was in violation of the applicants' right to property secured under **Article 40(1)** of the **Constitution of Kenya, 2010**. Further, **Article 40(3)** states as follows:

**“The State shall not deprive a person of property of any description, or of any interesting, or right over, property of any description, unless the deprivation –**

- a) **results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with chapter five; or**
- b) **is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that –**
  - a) **requires prompt payment in full, of just compensation to the person; and**
  - b) **allows any person who has an interest in, or right over, that property a right of access to a court of law.”**

By revoking the applicants' title to their property, the respondents clearly violated the aforesaid provisions of the Constitution. An act that is unconstitutional can be quashed by way of a judicial review order of certiorari, which I hereby do.

Contrary to the respondents' submissions, the issue of ownership of the suit property is not in issue. There is uncontroverted evidence that the same is owned by the applicants. Where ownership of a property is contested, the dispute cannot be resolved by way of judicial review proceedings but that is not the case in this matter.

The respondents submitted that the action that was taken in respect of the suit property is justifiable under the provisions of **Section 60(1)** of the **Registration of Titles Act Cap 281**. That cannot be true. The section states as follows:

**“60. (1) Where it appears to the satisfaction of the registrar that a grant, certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that an entry or endorsement has been made in error on any grant, certificate of title or other instrument, or that a grant, certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that a grant, certificate or instrument is fraudulently or wrongfully retained, he may summon the person to whom the grant, certificate or instrument has been so issued, or by whom it has been obtained or is retained, to deliver it up for the purpose of being corrected.**

**(2) If that person refuses or neglects to comply with the summons, or cannot be found, the registrar may apply to the court to issue a summons for that person to appear before the court and show cause why the grant, certificate, or other instrument should not be delivered up to be corrected, and, if the person when served with the summons neglects or refused to attend before the court at the time therein appointed, the court may issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the court for examination.”**

That section only empowers the registrar to summon a holder of a grant, certificate of title or other instrument to deliver to him such document for the purpose of being corrected where the registrar is satisfied that the document;

- a) was issued in error; or
- b) contains any misdescription of land or boundaries; or
- c) an entry or endorsement has been made in error; or
- d) was fraudulently or wrongfully obtained; or
- e) is fraudulently or wrongfully obtained.

If the registrar summons a person for any of the aforesaid reasons and the person refuses or neglects to comply with the summons or cannot be found, the registrar may apply to the court to issue summons for that person to appear before the court and show cause why the grant, certificate or other document should not be delivered up to be corrected.

Only the court has power to direct the registrar to cancel a title, but only in appropriate cases where after examining the person and considering all the relevant issues of law and fact, is satisfied that such title ought to be cancelled. See **Section 61** of the **Registration of Titles Act**.

In this case, if the respondents were satisfied that the parcels of land listed in Gazette Notice No. 3460 were unlawfully acquired, they ought to have used the due process of law set out under **Sections 60** and **61** of the **Registration of Titles Act**.

**Article 10** of the **Constitution of Kenya, 2010** sets out values and principles of governance that bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution or any law or makes or implements public policy decisions. The values and principles include the rule of law, equity, human rights, transparency and accountability. The

respondents' decision or act did not demonstrate these important values.

While I appreciate the respondents' concern, which is shared by this court and the public generally, regarding several parcels of land formerly owned by the Government that were unlawfully acquired by individuals and the need to ensure that they revert to the Government, that exercise must be undertaken in accordance with the law. The wise words by the Court of Appeal in **CHRISTOPHER N. MURUNGARU v KENYA ANTI-CORRUPTION COMMISSION & ANOTHER**, Civil Application No. NAI 43 OF 2006 (unreported) are worth repeating. The court delivered itself thus:

**“We recognize and are aware of the fact that the public has legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished. But in our view, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public. The only institution charged with the duty to interpret the provisions of the Constitution and to enforce those provisions is the High Court and where it is permissible, with an appeal to the Court of Appeal. We have said before and we will repeat it. The Kenyan nation has chosen the path of democracy; our Constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times a messy system. A dictatorship, on the other hand, might be quite efficient and less messy. .... That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implies due process. The courts must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the courts' decisions.”**

I am satisfied that the orders of certiorari and prohibition sought by the applicants are merited and hereby grant the same. The respondents shall bear the costs of this application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2011.**

**D. MUSINGA**  
**JUDGE**

**In the presence of:**  
**Nazi – Court Clerk**  
**Mr. Kipkogei for the Respondent**  
**Mr. Ongwae for the Applicant**